

BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA
DOCKET NO. 2014-346-WS

IN RE: Application of Daufuskie Island Utility) **ORS MEMORANDUM**
Company, Incorporated for Approval of an) **HEARING ON REMAND**
Increase for Water and Sewer Rates, Terms)
and Conditions)

The Office of Regulatory Staff (“ORS”) respectfully submits this Memorandum as requested by the Public Service Commission of South Carolina (“Commission”) regarding the matter to be argued on January 21, 2020, concerning the remand of this case from the South Carolina Supreme Court.

PROCEDURAL BACKGROUND

Daufuskie Island Utility Company, Inc. (also referenced to as, “DIUC”, “Company”, or “Appellant”), is a water and sewer company regulated by the Commission. On June 9, 2015, DIUC filed an Application with the Commission requesting \$1,182,301 in additional revenue, consisting of water revenue increases of \$590,454, and sewer revenue increases of \$591,847.

The Commission granted the Petitions to Intervene by Haig Point Club and Community Association, Inc. (“HPCCA”); Melrose Property Owner’s Association, Inc. (“MPOA”); Bloody Point Property Owner’s Association (“BPPOA”), and Beach Field Properties, LLC (“Beach Field”)¹, which are collectively known as the Property Owners Associations (“POAs” or “Intervenors”).

¹ By letter dated July 12, 2016 to the Supreme Court, Beach Field stated that it did not have a position regarding the issues on appeal. Beach Field did not participate as a party Respondent in the initial appeal or in the first rehearing before the Commission.

In Order No. 2015-846, the Commission approved the Settlement Agreement, including evidence and findings that concurred with the recommendations contained in the ORS and Intervenor pre-filed testimony and DIUC's Application.

DIUC filed, on December 21, 2015, a Petition for Reconsideration and/or Rehearing, which was denied by the Commission on February 26, 2016, in Order No. 2016-50. On March 22, 2016, DIUC served and filed its Notice of Appeal on the Commission's Order Nos. 2015-846 and 2016-50. The Clerk's Office of the Supreme Court, ("Court"), assigned the matter Appellate Case No. 2016-000652. The Appeal was briefed, and on December 14, 2016, the parties presented their oral arguments. On July 26, 2017, the Court issued its Opinion reversing the Commission's Orders and remanding the matter for a *de novo* hearing. *Daufuskie Island Util. Co., Inc. v. S.C. Office of Reg. Staff*, 420 S.C. 305, 803 S.E.2d 280 (2017). In its Opinion, the Court held that the Commission erred in approving and adopting the Settlement Agreement and reversed and remanded the matter to the Commission for a new hearing as to all issues.

In its Opinion, this Court gave specific guidance on three issues: DIUC's Plant in Service as it relates to the elevated tank site, DIUC's entitlement to recovery of certain property tax expenses, and DIUC's recovery of certain bad debt expenses.² The Court, in its Opinion, specifically stated that rate cases are heavily dependent upon factors that are subject to change during the pendency of an appeal, and that a parties' economic realities may change, as a result, on remand the Commission may consider additional evidence.

After remand to the Commission, ORS conducted discovery on all additional evidence that DIUC introduced at the rehearing, and the parties pre-filed rehearing testimony of their witnesses. The rehearing was convened on December 6, 2017. On December 20, 2017, the Commission

² While DIUC also appealed Commission Order Nos. 2015-846 and 2016-50, as they pertained to management fees, rate case expenses, and other plant in service, the Court declined to provide specific guidance on these matters.

issued a one-page Directive detailing its vote affording DIUC the opportunity to earn approximately \$950,166 in additional revenues, while specifically stating that a full written Order would be issued by the Commission at a subsequent time in which all adjustments and rate matters would be explained, and that the Company was to design and file rates that produce the revenue increase granted in that Order.

The Commission issued, on January 31, 2018, Order No. 2018-68, which detailed all adjustments and rate matters to be adopted by DIUC. DIUC subsequently filed a Petition for Reconsideration and/or Rehearing on February 20, 2018, asserting that the Commission Order on Rehearing's analysis of Rate Base/Utility Plant in Service, accumulated depreciation/depreciation expense, and Rate Case expense required "additional refinement." The Company's Petition for Reconsideration and/or Rehearing was denied on May 16, 2018, by the Commission in Order No. 2018-346.

On June 13, 2018, DIUC served its Notice of Appeal of the Commission's Order Nos. 2018-68 and 2018-346. The Clerk's Office of the Supreme Court assigned this second appeal Appellate Case No. 2018-001107. Oral arguments were made by the parties before the Court on April 18, 2019.

On July 24, 2019, the Court issued its Opinion No. 27905 which reversed the Commission's Order and stated, "DIUC's rate application will now go before the commission for a third hearing." This matter was remitted to the Commission on September 27, 2019, after the Court denied the Respondents Motion for Rehearing. DIUC's counsel filed a letter with the Commission on November 15, 2019, advising the Company did not intend to introduce any additional evidence in this matter as "the record is fully developed and another hearing for further testimony or evidence is not necessary." Counsel for ORS filed a responsive letter with the

Commission on December 6, 2019 stating that “provided DIUC submits no additional evidence, ORS is prepared to rest on the evidence it submitted in the initial two hearings.”

BRIEF OVERVIEW OF THE SUPREME COURT ORDER

The Court’s Order reversing the Commission Order and remanding this case, for a second time, to the Commission provides little in the way of direct guidance for the Commission. The Order does specifically focus on the Guastella rate case expenses which were removed by ORS and adopted by the Commission in its Order. The Court additionally stated, “The commission’s wholesale rejection of every Guastella invoice appears retaliatory because the commission approved and awarded \$75,000 for Guastella’s services after the initial hearing.” The Court then instructed the Commission that it, “should evaluate the evidence in accordance with objective and consistent standards” and found that the Commission’s, “denial of rate case expenses it previously permitted was arbitrary because DIUC’s evidence was subject to a retaliatory, higher standard of scrutiny on remand.”

In conclusion, the Court’s most recent Order states, “we do not address the merits at all” and that “we simply require the commission and ORS evaluate the evidence and carry out their important responsibilities consistently, within the ‘objective and measurable framework’ the law provides.”

ISSUES FOR RECONSIDERATION AND POSITIONS OF ORS

The ORS believes the Commission, in the present case, is limited by the notice to its customers in its awarding DIUC increased rates and revenues. Any increase in allowable expenses, and the resulting revenue requirement may not exceed the rates noticed to customers.

DIUC's Second Revised Notice of Filing and Hearing, was served by U.S. mail to its customers on June 29, 2015 and requested rates that result in revenues of \$2,267,721.

Additionally, the Commission did not approve a bond to allow the Company to implement rates while the most recent appeal was pending. In accordance with S.C. Code Ann. §58-5-240(D), "the utility may put the rates requested in its schedule into effect under bond only during the appeal and until final disposition of the case." A bond, authorized by both §58-5-240 and §58-5-340, is the legal mechanism which has been made available to utilities by the General Assembly. Having a bond would have allowed DIUC to collect the rates it applied for as opposed to the rates approved by the Commission in its last Order. DIUC chose not to put its requested (applied for) rates into effect under bond pending resolution of the second appeal. Therefore, the Company cannot collect revenues from its ratepayers going forward which it claims to have lost as a result of its decision to not post a bond while the current appeal was pending. The Commission is a body of limited jurisdiction and only has those powers vested in it by act of the General Assembly. *Piedmont & Northern Ry. Co. v. Scott*, 202 S.C. 207, 24 S.E.2d 353 (1943), see also, *Black River Elec. Co-op., Inc. v. Public Service Commission*, 238 S.C. 282, 120 S.E.2d 6 (1961).

The Commission may not permit the Company to charge DIUC's future customers for the speculative past revenues the Company forfeited by failing to post a bond with the Commission. The Company is similarly prohibited from charging its customers for any interest on any alleged lost revenues. Rate-making is a prospective rather than a retroactive process. *S.C. Elec. & Gas Co. v. Pub. Serv. Comm'n*, 275 S.C. 487, 272 S.E.2d 793 (1980). The awarding of any rates which provide for the future collection of any past lost revenues or interest through rates would constitute retroactive ratemaking. "Retroactive rate-making is prohibited based on the general principle that those customers who use the service provided by the utility should pay for its production rather

than requiring future ratepayers to pay for past use.” *Porter v. South Carolina PSC*, 328 S.C. 222, 231, 493 S.E.2d 92 (1997).

As to the issue of DIUC’s authorized rate base, ORS offers no additional information beyond that already contained in the record, which contains ORS’s position. As with the inclusion of additional rate case expenses, the Commission is limited to only authorize an increase in rate base and expenses which produces the rates and revenue requirement requested by DIUC and noticed to its customers in 2015.

The Company bears the evidentiary burden of demonstrating to the Commission that the existing record supports any claim that may be currently made by DIUC for additional allowable expenses or additions to rate base. The Court only specifically addressed the Commission’s need to reconsider the \$75,000 in Guastella rate case expenses that was awarded in the Commission’s initial Order. Therefore, the Commission should require that DIUC outline for the Commission the provisions within the Court’s Order identifying the costs and rate base which should be allowed the Company. Any other expenses incurred by the Company that the Commission chooses to award, including, additional rate case expenses, as stated above, are limited to the rates noticed to ratepayers in 2015. DIUC has possessed the right to file another rate case with the Commission for the past three and a half years. The Company therefore cannot now effectively assert that it has been disadvantaged or denied the ability to collect rates based on its current rate base and expenses.

In addition to the limitation imposed by the notice and the prohibition against retroactive rate-making, ORS believes that DIUC is only entitled to expenses which by evidence were actually paid by the Company. In the last reconsideration hearing, ORS accurately recommended that the Commission exclude certain expenses that failed to meet certain standards; one being an allowable

expense for ratemaking purposes must have been proven to have actually been incurred or paid by the utility. DIUC's customers should not be ordered to pay for potential expenses or expenses which may or may not eventually be paid by the Company. If those expenses were included in the ratemaking process yet never paid by the utility; the utility would earn revenues that it should not be entitled to collect.

ORS believes that the Commission did allow, and include in its Order, the \$75,000 in rate case expenses addressed in the Supreme Court opinion. However, it appears that the Court's Order instructs, or at least strongly suggests, that the Commission reconsider the rate case expenses to be allowed; in particular whether to include an additional \$75,000 to the rate case expenses granted in the Commission's most recent Order.

CONCLUSION

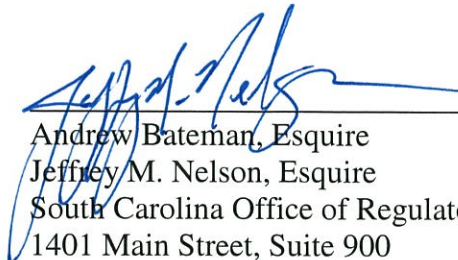
The South Carolina Supreme Court has provided the Commission with limited guidance on how to address DIUC's rate case expenses or rate base.

ORS is not submitting any additional evidence in this case and has not conducted any new discovery or audits of any of the Company's expenses. ORS asks that the Commission issue an Order in this case awarding DIUC rates and revenues which include rate case expenses in an amount which includes the amount awarded by the Commission in its last Order plus the \$75,000.00 which the South Carolina Supreme Court interpreted as having been taken away from the Company after the Commission's initial Order in this matter.

ORS believes that the Commission is constrained by the rates noticed to customers and cannot award DIUC rates and revenues which exceed those amounts.

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Respectfully submitted,



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